

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of Application of	)	
	)	
WIRELESS TELCO	)	FCC File No. 9510603
	)	
Request for Reinstatement <i>Nunc Pro Tunc</i>	)	
and/or Stay of Processing Action	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 25, 2000**

**Released: September 15, 2000**

By the Commission:

1. The Commission has before it an Application for Review filed by Wireless Telco on May 1, 2000. Wireless Telco requests reconsideration of a March 30, 2000 *Order*<sup>1</sup> by the Wireless Telecommunications Bureau's (Bureau) Public Safety and Private Wireless Division dismissing the above-captioned application for authorization to provide service in the 38.6 to 40.0 GHz (39 GHz) band.<sup>2</sup> In the alternative, Wireless Telco requests a stay of the *Order*,<sup>3</sup> pending the completion of a multi-party appeal of the 39 GHz policies currently before the D.C. Circuit.<sup>4</sup>

2. We have analyzed the Application for Review and find that the Commission staff properly decided the matters raised. The Commission has established and affirmed a processing policy concerning 39 GHz channels that includes the dismissal of (a) applications that failed to meet the thirty-day public notice requirement as of November 13, 1995; (b) all new applications, major modification applications and amendments filed on or after November 13, 1995; and (c) applications whose mutual exclusivity was not resolved by December 15, 1995 and amendments resolving mutual exclusivity that were filed on or after December 15, 1995.<sup>5</sup> In addition, the Commission's Rules provide for the dismissal of mutually exclusive

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<sup>1</sup> See Wireless Telco Request for Reinstatement *Nunc Pro Tunc* and/or Stay of Processing Action, *Order*, 15 FCC Rcd 10078 (WTB PSPWD 2000) (March 30<sup>th</sup> *Order*).

<sup>2</sup> See Wireless Telco, Application for Review (filed May 1, 2000).

<sup>3</sup> *Id.*

<sup>4</sup> See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (consolidating Case Nos. 99-1361 and 99-1362).

<sup>5</sup> See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18639-45 ¶¶ 83-97 (1997), *aff'd*, Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 14 FCC Rcd 12428, 12440-51 ¶¶ 19-44 (1999).

applications and late-filed competing applications.<sup>6</sup> As explained in the March 30<sup>th</sup> *Order*, on September 27, 1999, the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch (Branch) dismissed Wireless Telco's initial application.<sup>7</sup> The Branch found that Wireless Telco's application was untimely filed because it conflicted with the Bay Area application, which had established a cut-off period of March 31, 1992.<sup>8</sup> The Branch therefore dismissed the application in accordance with Section 1.934(f) of our Rules.<sup>9</sup> We now affirm this decision.

3. In the alternative, Wireless Telco requests a stay of the March 30<sup>th</sup> *Order*<sup>10</sup> pending the outcome of related proceedings before the United States Court of Appeals for the District of Columbia.<sup>11</sup> To receive a stay of an administrative action, a party must show that: 1) it will suffer irreparable harm if the stay is not granted, 2) it is likely to prevail on the merits of its appeal, 3) the grant of a stay will not harm other interested parties, and 4) the grant would serve the public interest.<sup>12</sup> Wireless Telco argues that a stay of the March 30th Order would serve the public interest by eliminating the need for duplicative litigation and remove uncertainties as to the availability of the subject frequency assignments with respect to the conflicting license rights that may attach as a result of the 39 GHz auction.<sup>13</sup> We disagree.

4. First, the plain language of the test to receive a stay of a Commission action provides that a stay request shall be granted only upon a finding that all four conditions are satisfied.<sup>14</sup> Thus, where any one of the four conditions is not satisfied, the subject stay request will not be granted. Wireless Telco fails to address the first three prongs of this test. As a result, Wireless Telco cannot satisfy the requirements for a stay.

5. Second, Wireless Telco argues that the public interest benefits support the grant of a stay in this matter. Again, we disagree. We are not persuaded that Wireless Telco's alleged injuries are sufficient to warrant a stay. In this connection, we note that consolidating this matter with the related proceedings before the court would not be duplicative. Moreover, if Wireless Telco wholly prevails in its judicial appeal of the Commission's decision, then we would "forthwith give effect thereto."<sup>15</sup> Finally, we

<sup>6</sup> See 47 C.F.R. § 21.31 (b)(2)(i) (1995); 47 C.F.R. § 101.45(b)(2)(i) (disposition of mutually exclusive applications). See also 47 C.F.R. § 1.934 (dismissal of defective applications).

<sup>7</sup> March 30<sup>th</sup> *Order*, 15 FCC Rcd at 10079 ¶ 4 (citing Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, to Wireless Telco (Sept. 27, 1999)).

<sup>8</sup> *Id.*

<sup>9</sup> See 47 C.F.R. § 1.934(f) (providing for dismissal of early- or late-filed applications).

<sup>10</sup> Application for Review at 2, 5.

<sup>11</sup> See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (Consolidating Case Nos. 99-1361-1362) (D.C. Cir. 1999).

<sup>12</sup> See *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958), as revised by *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

<sup>13</sup> Application for Review at 6-7.

<sup>14</sup> See *Washington Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985).

<sup>15</sup> See 47 U.S.C. § 402(h).

believe that reinstating Wireless Telco's application would frustrate the goals underlying the 39 GHz proceeding and "could lead to results inconsistent with our intent . . . to update the regulatory structure of the 39 GHz band in light of contemporary market conditions."<sup>16</sup>

6. In light of the above, we find that Wireless Telco has not shown an injury warranting injunctive relief.<sup>17</sup> Accordingly, we deny Wireless Telco's request for a stay of the March 30<sup>th</sup> Order.

7. We have analyzed the Application for Review and find that the Commission staff properly decided the matters raised. Therefore, we uphold the staff decision for the reasons stated therein. There is no reason to disturb it.

8. Finally, Wireless Telco argues that although it believes that the Division's March 30, 2000 *Order* is a ministerial extension of full Commission orders, it had to file this application for review to preserve its rights of review. Section 5(c)(7) of the Communications Act of 1934, as amended, bars direct judicial appeal of delegated authority action.<sup>18</sup> Thus, we agree that the filing of the application for review was required to preserve Wireless Telco's rights of review.

9. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Wireless Telco on May 1, 2000 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>16</sup> *July 29 MO&O*, 14 FCC Rcd at 12437-38; Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 12 FCC Rcd 2910, 2917 ¶ 15 (1997); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rule Making and Order*, 11 FCC Rcd 4930, 4988-89 ¶¶ 121-124 (1996).

<sup>17</sup> *Washington Gas Co. v. FERC*, 758 F.2d at 669.

<sup>18</sup> *See* 47 U.S.C. § 5(c)(7).